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IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

R. ANTHONY MARRESE, M.D., and BONE AND JOINT SURGEONS, INC.,

Petitioners,

v.

INTERQUAL, INC., et al.,

Respondents.

SUPPLEMENTAL BRIEF OF PETITIONERS

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TABLE OF AUTHORITIES

Cases

	PAGE
California Retail Liquor Dealers Assn v. *Midcal Aluminum., Inc.* 445 U.S. 97 (1980)	4
Capital Telephone Co. v. *New York Telephone Co.* No. 84-7176 (2d Cir. Dec. 18, 1984)	3
Hybrid Equipment Corp. v. *City of Akron,* 742 F.2d 949 (6th Cir. 1984), cert. denied, (April 1, 1985), 48 A.T.T.R. 622 (BNA)	3
Town of Hallie v. *City of Eau Claire,* ____ S.Ct. ____, 82-1832 (March 27, 1985), 48 A.T.T.R. 570 (BNA)	1, 2, 3, 4
Southern Motor Carriers Rate Conference, Inc. v. *United States,* ____ S.Ct. ____, 82-1922 (March 27, 1985), 48 A.T.T.R. 574 (BNA)	1, 3, 4

Statutes

Ind. Code § 34-4-12.6-3	3
Wisc. Stat. Ann. § 66.096(2)(c) (Supp. 1984)	2

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Pursuant to Rule 35.5 of the Rules of Practice of this Court, Petitioners, R. ANTHONY MARRESE and BONE AND JOINT SURGEONS, INC., hereby respectfully discuss the appropriateness of reviewing the Seventh Circuit's decision in the instant case in light of this Court's recent decisions in *Town of Hallie* v. *City of Eau Claire,* ____ S.Ct. ____, 82-1832 (March 27, 1985) 48 A.T.T.R. 570 (BNA), and *Southern Motor Carriers Rate Conference, Inc.* v. *United States,* ____ S.Ct.____, 82-1922 (March 27, 1985) 48 A.T.T.R. 574 (BNA).

The first issue presented is the degree of clarity with which a state legislature must articulate its intent to displace competition with regulation. *Town of Hallie* holds that the state legislature need not specifically state that it intends anticompetitive conduct to result from application of state policy; it is sufficient that such conduct "is a foreseeable result" of engaging in the authorized activity. 48 A.T.T.R. at 572. In that case, the state legislature was clear in its delegation of authority to the *City of Eau Claire* to provide or withhold sewage treatment and other related services. Wis. Stat. Ann. § 66.096(2)(c) (Supp. 1984). Cases involving such absolute grants of discretion will be easily resolved under this standard. But other courts, lacking appropriate guidelines, will remain free to engage in unwarranted speculation as to what the legislature could reasonably have foreseen at the time of enactment of its statute and, more importantly, what sorts of conduct may objectively be viewed as "foreseeable" in the context of legislative pronouncements.

The Seventh Circuit, in the case at bar, applied a subtly yet radically different test. It found that a hospital staff's review of medical treatment and surgical procedures of a competing doctor was a "necessary *and* reasonable consequence" of implementing the states policy favoring peer review, *Marrese* v. *Inter Qual,* (App. 30). But the peer review process itself is not challenged by the petitioners. It is the perversion of this process to serve the competitive positions of certain of the defendants which is being challenged.

The fundamental flaw in the Seventh Circuit's analysis was that peer review can be accomplished without a violation of the antitrust laws.

It is this simplistic approach to the implementation of the state action doctrine which causes the Seventh Circuit's opinion in this case to conflict with this court's decisions and the decisions of the Second and Sixth Circuits in framing the

appropriate inquiry. See *Capital Telephone Co.* v. *New York Telephone Co.*, No. 84-7176 (2d Cir. Dec. 18, 1984); *Hybud Equipment Corp.* v. *City of Akron*, 742 F.2d 949 (6th Cir. 1984), *cert. denied*, (April 1, 1985) 48 A.T.T.R. 622 (BNA).

In *Hybud Equipment Corp.*, the court found that the challenged activities themselves were "necessary and reasonable" consequences of engaging in the authorized activity. *Id.* at 962. The Seventh Circuit, on the other hand, distorted this test beyond logical application by deciding that simply because an occasional recommendation of staff privilege revocation is a reasonable consequence of engaging in legislatively authorized peer review, any and all motivations and activities leading to such a recommendation by a peer review committee are beyond antitrust inquiry. This reasoning has the absurd effect of immunizing anticompetitive behavior which the Indiana legislature not only *foresaw*, but *expressly guarded against* by excluding from state court immunity peer review activities undertaken in bad faith. Ind. Code § 34-4-12.6-3.

Unlike *Town of Hallie* or *Southern Motor Carriers*, the legislative scheme at issue here does not encompass any grant of absolute discretion in exercising *delegated* authority. On the contrary, the Indiana legislature merely authorized hospitals to exercise authority they possess independent of the legislature. The Indiana legislature simply has not authorized peer review committees to engage in anticompetitive activities. A reasonable exercise of delegated discretion such as that involved in *Hybud Equipment Corp.* differs substantially from the situation here presented in the parameters set by the legislature.

Though this Court has not explicated this "foreseeability" standard in any detail, it seems intuitive that foreseeability must be evaluated in the context of the legislative pronouncement in question and that the appropriate focus of the evaluation must be the precise conduct that is challenged. In *Southern Motor Carriers*, this Court stated that Petitioners' conduct would be

entitled to *Parker* immunity only if their challenged activity —collective ratemaking—was clearly sanctioned by the legislature. *Southern Motor Carriers Rate Conference, Inc.* v. *United States,* 48 A.T.T.R. at 578. By analogy, the conduct claimed to be immune from antitrust scrutiny should, at the very least, be demonstrated to have been foreseen and implicitly approved by the legislature.

The question of whether the legislature must at least "foresee" the specific alleged anticompetitive conduct before that conduct will be immunized from antitrust examination is one left open by the Court's recent decisions. Examination of this issue in the instant case will surely help to resolve the conflict this doctrine has engendered by ensuring that only true state action escapes antitrust liability.

The second issue presented in this case is the extent of state supervision required in order to qualify for immunity under other prong of the test enunciated in *California Retail Liquor Dealers Assn.* v. *Midcal Aluminum, Inc.,* 445 U.S. 97 (1980); active state supervision of the regulatory program in question. The Court in *Town of Hallie* held that this second prong of the *Midcal* test is inapplicable to municipalities. 48 A.T.T.R. at 573. The respondents in *Southern Motor Carriers,* moreover, conceded the presence of sufficient active state supervision; thus the Court in finding *Parker* immunity did not analyze this issue. By finding that adequate "active state supervision" exists when no state agency has the authority to affect the ultimate actions of a peer review committee, the Seventh Circuit has added a dimension of unbelievable confusion to the *Parker* doctrine. Reversal of the Seventh Circuit's decision and clarification of the "active state supervision" doctrine are essential and will provide the finishing touch to the doctrines as developed by this court in *Midcal Aluminum Inc.* As discussed in the Petition for Certiorari, disagreements abounds regarding the minimum level of "active" involvement by the state in order to immunize

regulatory programs with anticompetitive effects. The Seventh Circuit's unprecedented approach to this troublesome question, if allowed to stand, will serve only as an obstacle to complete understanding of the state action immunity doctrine.

Respectfully submitted,

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